FILE COPY.

FILED.
APR 22 1907
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

No. 567 OCTOBER TERM, 1906.

WILLIAM H. ELLIS, Plaintiff in Error,

vs.

THE UNITED STATES, Defendant in Error.

In Error to the District Court of the United States for the District of Massachusetts.

BRIEF OF THE PLAINTIFF IN ERROR.

D. T. WATSON,
Attorney for Plaintiff.

Smith Bros. Co. Inc., Franklin Print. 412 Grant Street, Pittsburgh.

INDEX.

PAGE

Facts..... 1

Specifications of Errors..... 8

POINTS OF LAW:

Questions to be raised and discussed..... 12

Atkin vs. Kansas distinguished..... 13

ARGUMENT:

Freedom of contract except in unhealthy employments is undoubted..... 16

Act of 1892 makes the breach of a civil contract a crime..... 18

"Require or Permit" in Act of 1892..... 20

When a State contracts with private persons it waives its sovereignty and it is to be treated as a private person and subjected to principles of law applicable as between individuals..... 25

Powers of Congress limited, and for every act of Congress a warrant must be found in the Constitution..... 31

Legislation to carry into execution an express power of Congress must be in fact a means appropriate and plainly adapted to that end.... 32

AUTHORITIES:

Restriction of Hours of Labor..... 37

Distinctions between Police Law and Criminal Legislation..... 38

Police Power of Congress..... 39

Intent..... 42

Extraordinary Emergency..... 45

Appendix.

Act of Aug. 1, 1892, c 352, U. S. Comp. Stat., p. 2521. 1

IN THE

Supreme Court of the United States.

No. 567 OCTOBER TERM, 1906.

WILLIAM H. ELLIS, Plaintiff in Error,

vs.

THE UNITED STATES, Defendant in Error.

In Error to the District Court of the United States for the District of Massachusetts.

Facts.

On October 13th, 1905, the United States entered into a contract with William H. Ellis, the defendant, by which the defendant agreed to construct and complete pier No. 2 at the Navy Yards in Boston, Massachusetts, and do certain dredging work within six calendar months. The officer of the United States was given full control of the work and power to decide all disputes.

So far as the record shows, the contract contained no references whatever to the Act of 1892, but did contain, *inter alia,* the following provisions:

> "The contractor shall employ only competent, careful, orderly persons upon the work, and if at any time it shall appear to the officer in charge that any person employed upon the work is incompetent, careless, reckless or disorderly or disobeys or evades orders or instructions or shirks his duty, such person shall be immediately discharged from and not again employed upon the work."

There was no provision restricting the hours of labor:

> "*Unavoidable delays* are such as result from causes which are undoubtedly, or may reasonably be presumed to be beyond the control of the contractor, such as acts of Providence, unusual storms, fires (not the result of negligence), fortuitous events, inevitable accidents, etc."

The piles to be used were to be of straight, long-leaf yellow pine, not less than 8 inches in diameter at the point, and 12 inches in diameter at a point 5 feet from the butt.

The defendant was indicted because he (p. 3):

> "did, as such contractor as aforesaid, then and there intentionally require and permit a certain mechanic, to wit, Amable De Gaust to work, and said De Gaust did work on the said public work for more than 8 hours on a certain calendar day, to wit, on said 13th day of June, there being then and there no extraordinary emer-

gency requiring the employment of said De Gaust on said public work for more than eight hours on said day."

The second count of the indictment was the same, except that it changed the name of the employee to Solomon Moore.

The Government called in support of its case only Fred Thompson, a civil engineer in the Navy who had charge of the construction of the pier. It was his duty to see (p. 9) that the pier was built in accordance with the contracts and specifications, and he, knowing the conditions of the work, knew that men were being employed on the work and knew that they were being employed more than eight hours on June 13th, and that there was no complaint or disturbance arising from that fact. He did not object to it—nor did the Navy Department, nor the men employed, object.

This Navy Yard in Boston is the home of the North Atlantic Squadron (p. 11) and the work in the construction of the pier was, as this witness testified,

"pretty much rush work,"

and the defendant used every effort to complete the work as rapidly as possible, including working over time.

The construction of this pier, the witness said (p. 12), was reasonably necessary for the safe docking of the ships.

The defendant called Seth Perkins, who was associated in business with the defendant and was a civil engineer (p. 13) and he testified:

"The defendant knew that the men were employed on that work more than eight hours on June 13th, 1906. On that day I was pushing the work to completion in all ways as rapidly as I could, including overtime working. The defendant was then employing on the construction of the pier all the men that could be worked there to advantage, and was doing everything that could be done to complete it as rapidly as possible."

There had been delays in obtaining the piles and they found they could not obtain the long-leaf piles anywhere near reasonable time. They also found unexpected difficulty in obtaining the white oak piles. It was impossible to get them (p. 14) and the deliveries were all late.

The two men worked nine (9) hours a day (p. 17).

Among other things, the defendant requested the court to charge the jury:

"(1) Sections 1 and 2 of the Act of August 1, 1892, Chapter 352 (27 Stat. L. 340) are repugnant to the Fifth Amendment of the Constitution of the United States in that they deprive this defendant of his liberty and property without due process of law."

"(2) Said Sections 1 and 2 are invalid, because they limit and restrict the service and employment of laborers and mechanics upon any of the public works of the United States to eight hours in any one calendar day, except in case of extraordinary emergency, even when such service and employment for more than eight hours in one calendar day in no wise injuriously affects the public health, safety or welfare, or the health, welfare or safety of the persons so employed."

"(3) It is competent for the jury, on the evidence in the case to find that there were extraordinary emergencies requiring the employment of the persons named in the different counts of said indictment and to return verdicts of not guilty under each of said counts." (p. 17.)

"(6) The defendant did not intentionally violate any such provision unless he knew of the existence of such provision and knew that by his acts or conduct he was violating the same." (p. 18.)

"(9) The contract of the Government with Ellis did not contain any clause forbidding Ellis to carry on his work by permitting men to labor more than eight hours per day."

"(10) The Act of 1892 under which this indictment is presented, does not provide that the Act itself is to form a part of every contract made by the Government in its manifold industries, but on the contrary, left it discretionary, depending upon the nature of the work and the discretion of the officials in charge of the same, as to whether eight hours a day should be insisted upon or not when each contract is made."

The Court below charged the jury:

"The Court in this case has ruled that there is nothing in the Constitution of the United States which forbids the passing of this law; in other words, that this law is constitutional."

The Court further instructed the jury (p. 23):

"It has been admitted by the defendant that he knew that De Gaust and Moore were required and per-

> mitted to work more than eight hours on June 13th, the calendar day named in the indictment; and I instruct you, gentlemen, that if all the other elements of offense are present, *that would be an intentional violation* of the Statute on the defendant's part. If the defendant intended to permit these men to work over eight hours on the calendar day named, then he intended to violate the Statute and there seems to be thus far no question that the elements to which I have referred already are established here."

On the question of extraordinary emergency, the Court further charged (p. 23):

> "What then, is a case of extraordinary emergency, such as is contemplated in this Act of Congress? Upon that point I instruct you that extraordinary emergency, such as contemplated by the Act, is the sudden, unexpected happening of something not of the usual, customary or regular kind, demanding prompt action to avoid imminent danger to life, limb, health or property. The possibility of danger is not enough. The peril must be sudden, unusual, imminent and actual in order to constitute an extraordinary emergency such as the Statute contemplates."

He further charged (p. 24):

> "I instruct you that, providing that you believe them, you are justified on the Government's evidence alone in finding it to be sufficiently proved that no case of extraordinary emergency existed here which justified the defendant in requiring or permitting these men to work more than eight hours on June 13th * * *

"I instruct that the evidence so introduced by the defendant is not sufficient for the purpose and that it does not show the existence of any case of extraordinary emergency. Therefore, gentlemen, on all the evidence in the case which is before you, I rule as a matter of law, that no case of extraordinary emergency existed which would authorize working these men over eight hours on June 13, 1906; none which affords justification to the defendant in requiring or permitting them to work more than eight hours on June 13, 1906.

"Now, gentlemen, it is for you to find a verdict according to the instructions which have been given to you in this case, taking the law as it has been laid down to you by the court, and to say whether the Government has or has not proved the defendant to be guilty of the offense charged."

The jury found the verdict of guilty, and the court sentenced the defendant to a fine of $250 on the first count and $250 on the second count of the indictment, and to stand committed until the same was paid.

To this judgment this writ of error is taken.

Specification of Errors.

FIRST. The Court erred in charging the jury

"It has been admitted by the Defendant that he knew that De Gaust and Moore were required and permitted to work more than eight hours on June 13th, the calendar day named in the indictment, *and I instruct you, gentlemen,* that if all the other elements of the offense are present *that would be an intentional* violation of the statute on the Defendant's part. If the Defendant intended to permit these men to work over eight hours in the calendar day named, *then he intended to violate the statute,* and there seems to be thus far no question that the elements to which I have referred already are established here."

SECOND. The Court erred in refusing to refusing to charge, as requested, that

"The defendant did not intentionally violate any such provision unless he knew of the existence of such provision and knew that by his acts or conduct he was violating the same.

THIRD. The Court erred in charging the jury as follows:

"It has been claimed in this case, although it is not a matter which has been discussed before you, that such

a law as this is a law which Congress had no right to pass. It has been contended that the Constitution of the United States forbids the enactment of such a law as this. Whether that is true or not is one of those questions of law of which I have spoken to you. The court in this case, however, ruled that there is nothing in the Constitution of the United States which forbids the passing of this law; in other words, that this law is constitutional."

FOURTH. The Court erred in refusing to rule and instruct the jury, as requested, that

"Sections 1 and 2 of the Act of August 1, 1892, c. 352, (27 Stat. at Large 340) are repugnant to the fifth amendment of the Constitution of the United States, in that they deprive this Defendant of his liberty and property without due process of law."

FIFTH. The Court erred in refusing to rule and instruct the jury, as requested, that

Said sections 1 and 2 are invalid because they limit and restrict the service and employment of laborers and mechanics upon any of the public works of the United States to eight hours in any one calendar day except in case of extraordinary emergency, even when such service and employment for more than eight hours in one calendar day in no wise injuriously affects the public health, safety or welfare or the health, welfare or safety of the persons so employed.

SIXTH. The Court erred in refusing to rule and instruct the jury, as requested, that

> When the Government entered into its contract with Ellis it waived its sovereignty and became practically a person so far as the future execution of the contract was concerned, with only the like remedies that an individual would have for the breach of the same, and governed in like manner by the provisions of the contract. Even if it be admitted that the Act of 1892 was read into the contract and because a part thereof, yet the permission by Ellis to allow men to labor for more than eight hours a day was merely a breach of a civil contract, where the remedy of the Government would be like the remedy of the individual, to recover in an action for damage for the injury done to the Government, and the Government could not enforce the performance of that contract by prosecuting Ellis and making him guilty of a crime for the non-performance thereof.

SEVENTH. The Court erred in ruling and instructing the jury

> "Therefore, gentlemen, on all the evidence in the case which is before you, I rule, as matter of law, that no case of extraordinary emergency existed which would excuse working these men overtime; and which would authorize working men over eight hours on June thirteenth, 1906; none which affords justification to the Defendant in requiring or permitting them to work more than eight hours on June thirteenth, 1906."

EIGHTH. The Court erred in refusing to rule and instruct the jury, as requested, that

> The Act of 1892 under which the indictment is presented, does not provide that the Act itself is to form a part of every contract made by the Government in its manifold industries, but on the contrary, left it discretionary, depending upon the nature of the work and the discretion of the officials in charge of the same as to whether eight hours a day should be insisted upon or not when each contract is made.

NINTH. The Court erred in refusing to rule and instruct the jury, as requested, that

> As the Government saw fit to make its contract with Ellis without restricting him to labor at eight hours a day, it thereby authorizes him to permit labor to be done for more than eight hours a day.

POINTS OF LAW.

The questions intended to be here raised and discussed are:

(1) The second Section of the Act of 1892 punishes only those

"who shall intentionally violate any provision of this Act."

Was it not error for the court below to take the question of intent from the jury as it did?

(2) May the United States, through Congress, use her power as a sovereign in enforcing her contract which she made with Ellis, the defendant, for the erection of a public pier, and may she punish a breach of that contract by making it a misdemeanor and a crime; and does not the Act of 1892 and the indictment and conviction of Ellis in this case under the provisions of that Act really amount to that?

(3) May Congress, which has no general criminal jurisdiction nor power to pass police laws, make an Act in itself indifferent, and which in no wise affects the peace and dignity of the United States or its property, a crime—a misdemeanor—and punish it by imprisonment, which it did by the Act of 1892, merely because the United States has power to build a pier, and in so doing, the right to establish by contract the details of the mode of its construction?

(4) Under what grant of power did Congress pass the Act of 1892 compelling Ellis, the defendant, to forcibly prevent laborers on the public pier from work-

ing more than eight hours a day; making it a misdemeanor for him to neglect so to do?

(5) Is not the absolute restriction of the hours of labor to eight by the Act of 1892 in contravention of the liberty of the citizen and therefore a violation of the Fifth Amendment?

(6) Does not the Act of 1892 properly constructed leave a wide discretion to the Navy Department as to what is emergency work within the contracts of that Department, and if that Department contracts without restriction of the hours of labor, as it did with Ellis for the erection within a limited time of a pier, and if that Department permitted men to labor more than eight hours a day on this pier, are not these facts for the jury bearing on the question of an intentional violation of the Act as well as that of extraordinary emergency.

ATKIN VS. KANSAS, 191 U. S., 223.

That case does not rule the present case:

(1) The statutes of Kansas and the Act of 1892 are dissimilar in these respects:

The Act of 1892 makes a violation of its provisions a misdemeanor and a crime:

The Kansas Act did not, though it inflicted punishment for its breach.

The Act of 1892 provides punishment only for an intentional violation of its provisions:

The Kansas Act said nothing about intentional violation.

The Act of 1892 contained no provision reading the terms of the Act into and making it a part of all subsequent contracts:

The Kansas Act did contain substantially such provision.

---

(2) The questions raised are different.

In that case there was no question raised as to the *intentional violation* of the Act, nor was it complained that the case had been taken from the jury by the court.

In the present case, that is one of our complaints and that is one of the questions raised.

In that case this court rested its rulings on
"the broad ground that work being of a public nature * * * it is for the state to prescribe the conditions under which it will permit work of that kind to be done."

No question there seems to have been raised as to the power of the state to make the violation of a contract a misdemeanor and a crime, and in this case that question is raised.

In that case the Act was passed by the state having the broad and unlimited police powers to provide for the public health and peace and safety, while in the present case the Act was passed by Congress which has no general police or criminal power, and whose acts must appear to be necessary and appropriate to the exercise of some granted power.

The Kansas Act regulating the hours of labor, regarded aside from its contractural aspects, was a simple police law, while the Act of Congress, so far as the conviction of the defendant in this case is concerned, raises the question of the power of Congress to declare Ellis' act in not preventing the men from working for more than eight hours a day, a misdemeanor and a crime.

That case raised no question as to the construction of the Act of Kansas, while this case raises such question as to the construction of the Act of Congress.

Viewed in the broad light as to whether either the United States or the state can restrict the hours of adult labor to eight hours a day, where the employment does not fall with obnoxious work, the two cases do raise the same question, though the power of Congress to do so does not necessarily follow from such a power in the State.

Argument.

It is not doubted that A, in his contract with B, may provide that B shall not work more than eight hours a day; and if A may do this, it is quite difficult to see why a municipal corporation may not, or a state or the United States. Either one of these, having a job to let, has the liberty of determining the details and the manner in which the work shall be carried on, and the laborer or mechanic may or may not agree to the terms of the contract. If he does agree, he is bound by it. His relations to the employer become contractual, and contractual only: His relations are not that of a subject to a sovereign, but of an equal with an equal, whose relative rights and duties are fixed by the terms of the contract: Such, and such only, were Ellis' relations to the United States for the erection of the pier: He owed the United States no duty as a subject to erect it: His duty arose solely by his contract.

We submit:

(I) The right of the individual to dispose of his labor upon such terms as he deems best, is undoubted, and admitted in *Atkin vs. Kansas,* 191 U. S. 223. If he may dispose of it at all, then the extent of the disposition is a matter optional with himself: The men who worked on the pier did so voluntarily. The sole crime of Ellis was that he did not forcibly restrain them from the work.

(II) The great weight, if not the universal voice of authority, is that an adult may, if he sees fit, engage for what time he sees fit in ordinary employments, not dangerous, hazardous or injurious to life, limb or health, and he has that right, as part of his liberty, the preservation of which was one of the chief features of the Federal Constitution. The Preamble states that in order (amongst other things) to

> "secure the blessings of liberty to ourselves and our posterity"

we do ordain the Constitution, and Article V of the Amendments excepted out of the power delegated by the people to the Congress the power to deprive him of his liberty.

(See the matter fully stated and authorities cited in *Lochner vs. New York,* 198 U. S., 53.)

The laborer can work nowhere unless employed. He works under contract. To take from him one of the places he may work over eight hours, public work, even if the contractor is willing to employ him, deprives him of part of his liberty and is unconstitutional.

See cases collected and commented on:

People vs. Orange Co., 65 L. R. A., 33, 175 N. York, 84.

Articles in Central Law Journal, No. 11, pages 147, 163, 181, 198; No. 58, page 361.

Allgeyer vs. Louisiana, 165 U. S., 578-591.

Holdin vs. Hardy, 169 U. S., 366-391.

Williams vs. Fears, 179 U. S., 270-274.

Butchers' Union vs. Crescent City, 111 U. S., 746-757.

There is no pretence in the present case that the kind of work done was hazardous—or unhealthy—or in any way dangerous to life or limb. It was not of a class with such cases as *Holden vs. Hardy,* 169 U. S., 366.

(III) It is one thing to hold that a state or municipality may by contract restrict the hours of labor, for by entering into the contract each person waives his right to the constitutional protection: It is entirely another thing to make it a crime for a man to insist on his constitutional right to labor more than eight hours a day. If, as we have seen, this is his constitutional right, any statute making it a crime to claim it clearly infringes the Constitution. Nor need the statute wholly deprive him of *all* kinds of labor. If it deprives him of *one* kind of labor to that extent it affects his liberty. If a man may so voluntarily labor, the fact that another does not forcibly prevent him is not a crime, nor can Congress arbitrarily impose on any one a positive duty such as this forcible control and convict him of a crime if he fails to do so.

(IV) The Act of 1892 is constitutional in so far as it prohibits the Departments from contracting for more than eight hours' labor per day on public works, but it is unconstitutional in so far as it makes it a

crime for one who has come into contractual relations with the government for that public work to permit some other man to work more than eight hours per day.

It is not pretended in this case that Ellis did aught else but *permit* two men to work more than eight hours a day. He did not force them to work more than eight hours a day; he owed no duty to the government to enforce its laws as a police officer or a sheriff. His relation to the Government was only and solely contractual so far as the pier was concerned; his contract did not contain any covenant that he was to oversee and prevent men from working on the pier more than eight hours a day, or if it did, if it be said that the Act of 1892 is read into Ellis' contract with the government and made part of it, and Ellis agrees to enforce the Act so far as the pier is concerned, still his relations with the government are contractual and contractual only.

The words of the Act of 1892 are *Require* or *Permit.*

"Require or Permit."

Peckham, J., in *Lochner vs. New York,* 198 U. S., 45, 52, (New York baker law) thus defined them:

> "All the opinions assume that there is no real distinction, so far as this question is concerned, between the words 'required' and permitted.' *The mandate of the statute that 'no employe shall be required or permitted to work,'* is the substantial equivalent of an enactment that *'no employe shall contract or agree to work,'* more than ten hours per day, and as there is no provision for special emergencies the statute is mandatory in all cases. It is not an act merely fixing the number of hours which shall constitute a legal day's work, but an absolute prohibition upon the employer, permitting, under any circumstances, more than ten hours' work to be done in his establishment."

Ellis had no right as a subject to build the pier, and he owed no duty to the government as a subject to build it. His relation then with the government was solely by reason of his contract to build it. The two men who worked on the pier owed no duty to the government to work there, and had no right to work there except by a permission of the government through the contractor. Their relations then to the government were purely contractual. It was not as between sovereign and subject, but as between two parties to a contract. The other party to the contract, either Ellis or the two laborers, has no possible power to enforce it against the United States except the ordinary right of one citizen against another, indeed he is even restricted in that from

his inability to sue the United States. The contract itself gives to the United States as against Ellis and the laborers no other or higher right to enforce its provisions than it gives to either Ellis or the laborers. Its words certainly do not even suggest such an extraordinary power as to enforce its provisions or punish its breach by making it a misdemeanor and a crime, and charging the party with moral turpitude.

It must not be forgotten that this Act of 1892 presupposes the existence of a contract relation between the United States and the contractor who erects the public works. Without the contract, as we have seen, the contractor has no duty or indeed has no right, to erect the works.

The case must not be confused and looked at as though it were a case between the subject and the sovereign, where the sovereign may dictate to the subject and provide that the violation of its dictates is a crime. That right is owing to the peculiar relation between subject and sovereign. It is the fealty of the subject to the sovereign that the subject obeys the sovereign's laws. It is part of the law for the protection of the sovereign that the subject should be punished if he violates the laws, but the idea that the sovereign may enforce its contracts by its sovereign power; may make an indifferent act an immoral and invidious one; may stain with moral turpitude the party who commits the breach, would give to the sovereign unfair and extraordinary remedies in his contract relation with its employees, and would be inconsistent with the theory and practice of our Government.

This Court said in *Robertson vs. Baldwin,* 165 U. S., 275, 281 (p. 281):

> "The breach of a contract for personal service has not, however, been recognized in this country as involving a liability to criminal punishment, except in the case of soldiers, sailors and possibly some others, nor would public opinion tolerate a Statute to that effect."

Mr. Justice Harlan in a dissenting opinion approved this, and said that the notion that

> "the government may make it a criminal offense punishable by fine or imprisonment, or both, for any one to violate his private contract voluntarily made, or to refuse without sufficient reason to perform it * * * is a proposition which cannot, I think, be sustained at this day in this land of freedom."

See:

People vs. Coler, 166 New York, 1-61.
Ex parte Kubach, 85 California, 274.

(V) The question here is not one under the police laws, for the employment does not touch the public health, peace and morals, and the United States has not the power except in a restricted way to pass police laws. The United States has not in that sense the well-being of the people of the States under its charge,

but its police laws must relate to granted power, and be adapted to the enforcement of it.

Cooley's Constitutional Limitations (7th Ed., p. 831.)

Hare's American Constitutional Law, p. 539.

If one engages in the kind of work which the morals or the health of society requires control of, and therefore is under its general supervision, as a part of the police laws, he may be subjected to reasonable restrictions by his state, but unless he falls within that class, he is not subjected to such restrictions, and to attempt to prevent him from working more than eight hours a day is to deprive him of his liberty, even under the State laws.

See cases cited ante.

(VI) The Act of 1892 in question limits and restricts "the service and employment of all laborers and mechanics who are now and may hereafter be employed by the government of the United States, by the District of Columbia or by any contractor or sub-contractor upon any of the public works of the United States or of the said District of Columbia,"

to eight hours in any one calendar day, and makes it unlawful for any officer of the government or contractor or sub-contractor

"whose duty it shall be to employ, direct or control the services of such laborers or mechanics, to require or *permit* any such laborer or mechanic to work more

> than eight hours in any calendar day, except in case of extraordinary emergencies."

It will be noticed that this Act makes it unlawful for any contractor either to

> "require or *permit*"

any laborer to work more than eight hours a day in any calendar day.

Not merely *require*, but *permit*.

That is, in some way the contractor must control, forcibly if necessary or by discharging from his service, any man who wants to work more than eight hours a day and thereby earn more money. This is an added duty which Congress imposed on those who contracted with it, but it is not a duty in the nature of that which the subject owes the sovereign.

Section 2 of this Act provides that whoever

> "shall *intentionally* violate any provision of this Act shall be deemed guilty of a misdemeanor, and for each and every such offense"

may be fined or imprisoned, or both.

While it is admitted that the United States may in its contracts for labor restrict the hours of labor, and whoever contracts with it on that basis is bound by the terms of the contract, yet it is respectfully submitted that the United States when it makes such a contract does so exactly as if it were an individual, and has the same and no other or greater rights to enforce the terms of the contract than would an individual.

In so entering into a contract, as the United States did in this case with Ellis, it waived its right and power as sovereign, and contracted just as an individual.

Having done so, it cannot punish the violation of that contract relation except by the usual and ordinary means that courts of justice afford or that are reserved to individuals, such as the rescission of a contract to enforce its provisions; it cannot hold over its contractor the awful powers of sovereignty in the making of laws, and it cannot make the violation of the terms of the contract a crime and thus attach a moral taint or add an unusual mode of enforcing the terms of contracts. It is not, as the quotations *ante* show, consistent with our system of government, and it is a denial to Ellis of his right to contract, makes Ellis guilty of a crime—of moral terpitude—if he breaks this contract, and is a discrimination against him as well as the imposing of unusual punishment.

When a State enters into business relations and makes contracts with private persons, it waives its sovereignty, and is to be treated as a private person and subjected to the principles of law applicable as between individuals, save only in respect to its immunity from suit.

Pennsylvania vs. Wheeling, &c. Bridge Co., 13 How., 518, 560.

The State of Pennsylvania filed a Bill to enjoin the erection of the bridge across the Ohio River at a point beyond its boundaries. The state proved that it had con-

structed and owned a system of canals and railroads from Philadelphia to Pittsburg and other public works from which it derived a large revenue, which would be lessened by any obstruction to navigation which diverted traffic from its lines of transportation. In sustaining the right of the State to file this Bill, McLean, J., said:

> "In this case, the State of Pennsylvania is not a party in virtue of its sovereignty * * *
>
> "When a State enters into a co-partnership, or becomes a stockholder in a bank, or other corporation, its sovereignty is not involved in the business, but it stands and is treated as other stockholders, or partners. And so in the present case, the rights asserted and relief prayed, are considered as in no respect different from those of an individual."

Darrington vs. The State Bank of Alabama, 13 Howard, 12:

In this case it was held that bills issued by a bank were not "bills of credit" within the constitutional prohibition, although the state owned the entire stock of the bank, the legislature elected the directors, the faith of the state was pledged for the redemption of the bills and they were made receivable in payment of all public dues.
(p. 17):

"The State, as a stockholder, held its property as a corporation or individual could hold it, in the Mobile Bank. The specie in its vaults, notes taken on discounts, and every description of property, managed by the directors of the bank, were subject to judicial process by its creditors. *And in such a procedure the State, in its sovereign capacity, could not interfere. Its powers would be no greater than the powers of individual stockholders of a bank, under similar circumstances.*"

Davis vs. Gray, 16 Wall., 203, 232.

In overruling a demurrer to a bill filed by the receiver of a railroad, to enjoin a land commissioner of the State of Texas from issuing patents of lands previously granted to the railroad, and now sought to be forfeited by the State, the Supreme Court, speaking through Justice Swayne, said: (232):

"When a State becomes a party to a contract, as in the case before us, *the same rules of law are applied to her* as to private persons under like circumstances. *When she or her representatives are properly brought into the forum of litigation, neither she nor they can assert any right or immunity as incident to her political sovereignty.*"

Bank of the United States vs. Planters' Bank of Georgia, 9 Wheat., 904, 907.

In the opinion by Chief Justice Marshall, it is said: (p. 907):

> "It is, we think, a sound principle, that when a government becomes a partner in any trading company, *it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen.*

United States vs. Bank of Metropolis, 15 Pet., 377, 392.

In holding the United States Government liable on a bill of exchange, accepted by its authorized agent, the court said:

(p. 392):

> "When the United States, by its authorized officer, became a party to negotiable paper, they have all the rights, and incur all the responsibility of individuals who are parties to such instruments. We know of no difference, except that the United States cannot be sued."

Suppose Congress had made it a misdemeanor for the acceptor or drawer of the Bill of Exchange to pay it would this Court have upheld such an Act?

Cooke vs. U. S., 91 U. S., 389-396.

> "It was conceded in the argument, that, when the United States become parties to commercial paper, they incur all the responsibilities of private persons under the same circumstances. This is in accordance with the

decisions of this court. *The Floyd Acceptances,* 7 Wall., 557; *United States vs. Bk. of Metropolis,* 15 Pet., 377."

Could Congress make the non payment of a note or check to the U. S. A. a misdemeanor?

(VII) Admitting that under the Federal Constitutional provision Congress may make all laws necessary and proper for carrying into execution the powers, for example, to provide and maintain a Navy, and that the erection of a pier may be regarded as under the power to provide a Navy or under the power to regulate commerce, it is still true that Congress has not the general police power that the different states have. It cannot legislate generally for the health, morals and happiness of the people, but it is restricted in its legislation to the specific things which were delegated to it in the Federal Constitution.

Therefore, in considering whether Congress may pass an Act of the kind of the Act of 1892 and make the performance of labor for more than eight hours a day a crime, and imprison one who, though he does not himself work, fails to prevent others from so doing, the question arises whether, under the Constitutional provision, it is necessary for carrying into execution the powers granted, for example, to provide and maintain a Navy and to regulate commerce, that it should have the power to provide that more than eight hours' labor or the omission to prevent it constitutes a misdemeanor, constitutes a crime importing moral turpitude.

Accepting the definition of the great Chief Justice, that all laws which are appropriate to the end may be passed by Congress, it still leaves open the question whether under the restriction of the preamble and the fifth amendment, Congress may so restrict the liberty of the citizen, inflict

criminal punishment for breach of a contract. Whether the pier is built by men laboring nine hours a day or eight hours a day would seem to be wholly immaterial so far as the power to erect the pier is concerned. There is nothing inherent in the limitations of the work for eight hours a day which in any way enhances or enforces the power to build the pier. With some show of reason it may be said that a state might pass an eight hour labor law under the reasons outlined by Mr. Justice Harlan in *Atkin vs. Kansas,* but such reasons are wholly inapplicable to the legislation like the Act of 1892, and besides Congress does not have the general police power. How can it be fairly urged that the omission of Ellis to prevent two men from working on the pier was an appropriate and necessary act to enforce the power to build the pier?

United States vs. Fox, 95 U. S., 670, 672:

An Act of Congress provided that if any person obtained goods upon false pretenses, and within three months thereafter bankruptcy proceedings were begun with respect to him, he should be punished by imprisonment. The Court held that the Act could not be upheld as legislation necessary and proper to carry into execution the power to establish a system of bankruptcy law, and was therefore unconstitutional.

Mr. Justice Field in the opinion of the Court said:

> "An act committed within a State, whether for a good or a bad purpose, or whether with an honest or a criminal intent, cannot be made an offence against the United States, unless it have some relation to the execution of a power of Congress, or to some matter within the

jurisdiction of the United States. An Act not having any such relation is one in respect to which the State can alone legislate."

The powers of Congress are limited to those expressly or by necessary implication conferred, and for every act of Congress a warrant must be found in the Constitution.

United States vs. Harris, 106 U. S., 629, 635:

"The government of the United States is one of delegated, limited and enumerated power. *Martin vs. Hunter's Lessee,* 1 Wheat., 304; *McCulloch vs. State of Maryland,* 4 id., 316; *Gibbons vs. Ogden,* 9 id., 1. Therefore every valid act of Congress must find in the Constitution some warrant for its passage. This is apparent by reference to the following provisions of the Constitution: Section 1 of the first article declares that all legislative powers granted by the Constitution shall be vested in the Congress of the United States. Section 8 of the same article enumerates the powers granted to the Congress, and concludes the enumeration with a grant of power 'to make all laws which shall be necessary and proper to carry into execution the foregoing powers and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof.' Article X of the

amendments to the Constitution declares that 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.'

"Mr. Justice Story, in his *Commentaries on the Constitution,* says: 'Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is whether the power be expressed in the Constitution. If it be, the question is decided. *If it be not expressed,* the next inquiry must be whether it is properly an incident to an express power and necessary to its execution. If it be, then it may be exercised by Congress. If not, Congress cannot exercise it.' Section 1234, referring to *Virginia Reports and Resolutions,* January, 1800, pp. 33, 34; *President Monroe's Exposition and Message of May 4, 1822,* p. 47; *1 Tuck. Black Commo. App.,* 287, 288; *5 Marshall's Wash. App.,* Note 3; *1 Hamilton's Works,* 117, 212."

Under the power

"to make all laws which shall be necessary and proper for carrying into execution the foregoing powers,

the legislation sought to be enacted by Congress must be in fact a means appropriate and plainly adapted to a legitimate and constitutional end.

In *McCulloch vs. Maryland,* 4 Wheat., 316.

Chief Justice Marshall laid down the rule for the construction of this clause in the Constitution, and his language has been often repeated, but never departed from by this court.

(p. 421):

"We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are *appropriate,* which are *plainly adapted to that end,* which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

And again the Chief Justice states that the power to pass incidental legislation exists.

United States vs. Fisher, 2 Cranch., 358, 396.
Cherokee Nation vs. Kansas Railroad Co., 135 U. S., 641, 657.
Prigg vs. Commonwealth of Penna., 16 Pet., 539, 615.

Hepburn vs. Griswold, 8th Wallace, 603-613-615:

"But the extension of power by implication was regarded with some apprehension by the wise men who framed, and by the intelligent citizens who adopted, the Constitution. This apprehension is manifest in the terms by which the grant of incidental and auxiliary powers is made. All powers of this nature are included

under the description of 'power to make all laws necessary and proper for carrying into execution the powers expressly granted to Congress or vested by the Constitution in the government or in any of its departments or officers.'

"The same apprehension is equally apparent in the tenth article of the amendments, which declares that 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States or the people.'

"We do not mean to say that either of these constitutional provisions is to be taken as restricting any exercise of power fairly warranted by legitimate derivation from one of the enumerated or express powers. The first was undoubtedly introduced to exclude all doubt in respect to the existence of implied powers; while the words 'necessary and proper' were intended to have a 'sense,' to use the words of Mr. Justice Story, *'at once admonitory and directory,'* and to require that the means used in the execution of an express power *'should be bona fide, appropriate to the end.'* The second provision was intended to have a like admonitory and directory sense, and to restrain the limited government established under the Constitution from the exercise of powers not clearly delegated or derived by just inference from powers so delegated.

"The rule for determining whether a legislative enactment can be supported as an exercise of an implied power was stated by Chief Justice Marshall, speaking for the whole court, in the case of *McCullough vs. The State of Maryland;* and the statement then made has ever since been accepted as a correct exposition of the Constitution. His words were these: 'Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are

plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution are constitutional.' And in another part of the same opinion the practical application of this rule was thus illustrated: 'Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution, or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would be the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to affect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and tread on legislative ground.'

"It must be taken then as finally settled, so far as judicial decisions can settle anything, that the words, 'all laws necessary and proper for carrying into execution' powers expressly granted or vested, have, in the Constitution, a sense equivalent to that of the words, laws, not absolutely necessary indeed, but appropriate, *plainly adapted to constitutional* and legitimate ends; laws not prohibited, but consistent with the letter and spirit of the Constitution; laws really calculated to affect objects intrusted to the government."

Legan Tender Cases, 12th Wallace, 543:

"Congress is not authorized to enact laws in furtherance even of a legitimate end, merely because they are useful,

or because they make the government stronger. *There must be some relation between the means and the end; some adaptedness or appropriateness of the laws to carry into execution* the powers created by the Constitution."

The purpose of an Eight Hour Law is correctly described by Justice Peckham in the *Lochner case* (198 U. S.) to be

"the state, in enacting the statute, intended to give its sanction to the view held by many, that, all things considered, the general welfare of employes, mechanics and workmen, upon whom rest a portion of the burdens of government, will be subserved if labor performed for eight continuous hours was taken to be a full day's work; that the restriction of a day's work to that number of hours would promote morality, improve the physical and intellectual condition of laborers and workmen and enable them the better to discharge the duties appertaining to citizenship."

If that is the real purpose of the Act of 1892; if it is intended as a health measure—or as promoting the morality of the employees—surely under the above cases Congress had no power to enact it.

If the prohibitory part of this Act of 1892, which forbids men from working over eight hours a day and punishes for its violation by making it a crime, is neither

"necessary or proper,"

nor

"bona fide appropriate to the end,"

nor

"plainly adapted"

to further and carry out directly granted powers of Con-

gress, but is an attempt to pass a so-called police law, it is unconstitutional.

One part of the Act, *i. e.*, providing for employing men to work only 8 hours a day is constitutional. It is a means fairly adapted to the end and one of the details which Congress may dictate.

But making the violation of the contract terms a misdemeanor is neither necessary nor appropriate to the end sought —the construction of the pier.

Authorities.

In the following cases, statutes, some of them quite similar to the statute in question, have been held to be unconstitutional.

By the Supreme Court of New York in *People vs. Orange Co.*, 175 N. Y., 84, where the Chief Justice said (p. 87):

> "It seems to me to be entirely clear that this statute cannot be upheld as an exercise of the police power vested in the Legislature. I think that the proposition is too plain for debate."

That statute provided that if any one required or permitted more than eight hours' work a day, he was guilty of a crime or misdemeanor.

Ryan vs. City of New York, 177 N. Y., 271.

People ex rel. Connessy vs. Grout, 179 N. Y., 117.

See also

In Re Morgan, 26 Colo., 414.

The Supreme Court of Nebraska so held in

Low vs. Reis, 41st Neb., 127.

See Freund on Police Power, Sections 315, 316, 317.

See also the cases cited *ante* from the Supreme Court of the United States opinions.

State of Ohio.

State of Ohio vs. Norton, 5th Ohio, (*Nisi Prius*) 183.

City of Cleveland vs. Construction Company, 67 Ohio, 197.

The Supreme Court of Illinois:

Chicago vs. Hurlburt, 205 Ills., 346, 363.

Fisk vs. the People, 188 Ills., 206, 210.

The State of Washington:

Seattle vs. Smyth, 22 Wash., 227.

The State of California:

Ex parte Kuback, 85th Calif., 284.

State of Indiana:

State vs. Varner Electrical Supply Co., 160 Ind., 338.

DISTINCTIONS BETWEEN THE POLICE LAW AND CRIMINAL LEGISLATION.

See *Freund on Police Powers,* Section 26:

> "There is, however, a difference between police legislation and criminal legislation which is popularly well understood and which is not without legal and constitutional significance. The peculiar province of the criminal law is the punishment of acts intrinsically vicious, evil and condemned by social sentment; the province of the police power is the enforcement of merely conventional restraints, so that in the absence of positive legislative action, there would be no possible offense. The difference here referred to roughly corresponds to that between misdemeanors and felonies or infamous crimes, or perhaps still more to that between *mala prohibta* and *mala in se.*"

In *Wharton on Crimes,* Vol. 1, Section 23a, it is said:

"That there is a distinction in ethics there can be no question, the one case involving, the other not involving, a moral taint.

* * * * * * *

"Police offences * * * are usually not against the material and moral element in the law, but against its formal structure."

POLICE POWER OF CONGRESS.

Matter of Heff, 197, U. S., 488, 505.

Brewer, J., said:

"The general police power is reserved to the States, subject, however, to the limitation that in its exercise the State may not respass upon the rights and powers vested in the General Government.

* * * *

"There is in these police matters no such thing as a divided sovereignty. Jurisdiction is vested entirely in either the State or the Nation and not divided between the two."

Leisy vs. Hardin, 135 U. S., 100, 158, Gray, J., dissenting:

"Congress cannot regulate this subject sale of liquor under the police power, because that power has not been conceded to Congress, but remains in the several States. * * *

"The protection of the safety, the health, the morals, the good order and the general welfare of the

people is the chief end of government. *Salus populi suprema lex.* The police power is inherent in the States, reserved to them by the Constitution, and necessary to their existence as organized governments."

Lottery Case, 188 U. S., 321, 365, Fuller, C. J., dissenting:

"To hold that Congress has general police power would be to hold that it may accomplish objects not entrusted to the General Government, and to defeat the operation of the Tenth Amendment, declaring that: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' "

The exercise of police powers pre-supposes the existence of sovereignty. The United States has no general or inherent sovereignty, but such sovereignty as it has is restricted to the exercise of the powers enumerated in the Constitution. It therefore follows that the police power of the United States is similarly restricted.

License Cases, 5 *Howard,* 504, 583.

Passenger Cases, 7 Howard, 424, Justice Wayne:

"Police powers, then, and sovereign powers, are the same, the former being considered so many particular rights under that name or word collectively placed in the hands of the sovereign."

Lake Shore, &c., Ry. vs. Smith, 173 U. S., 684, 689.

Legal Tender Case, 110 U. S., 467, Field, J.:

> "Congress can exercise no power by virtue of any supposed inherent sovereignty in the general government. Indeed, it may be doubted whether the power can be correctly said to appertain to sovereignty in any proper sense as an attribute of an independent political community. * * * there is no such thing as a power of inherent sovereignty in the government of the United States. It is a government of delegated powers, supreme within its prescribed sphere, but powerless outside of it. In this country sovereignty resides in the people, and Congress can exercise no power which they have not, by their Constitution, entrusted to it; all else is withheld."

Downes vs. Bidwell, 182 U. S., 369:

> "The source of national power in this country is the Constitution of the United States; and the government, as to our internal affairs, possesses no inherent sovereign power not derived from that instrument, and inconsistent with its letter and spirit."

Dred Scott vs. Sanford, 19 Howard, 401:

> "This difference arises, as we have said, from the peculiar character of the Government of the United States. For although it is sovereign and supreme in its appropriate sphere of action, yet it does not possess

all the powers which usually belong to the sovereignty of a nation. Certain specified powers, enumerated in the Constitution, have been conferred upon it; and neither the legislative, executive, nor judicial departments of the Government can lawfully exercise any authority beyond the limits marked out by the Constitution."

Intent.

The first section of the Act of 1892 does not use the word *intentional,* but merely provides that the service and employment of laborers and mechanics is hereby limited and restricted to eight hours in any one calendar day except in cases of extraordinary emergency.

Section II does use the word *intentional,* and it provides that any contractor

"whose duty it shall be to employ, direct or control any laborer or mechanic employed upon any of the public works of the United States or of the District of Columbia who shall *intentionally* violate any provision of this Act shall be deemed guilty of a misdemeanor."

Here the intent is made a necessary part of the crime. Without the use of the word *intentional* the construction of this section might have been that each person is bound to know the law and his ignorance is no excuse. But here we have the peculiar phrase

"intentionally violate"

How could one *intentionally* violate a law unless he knew of the existence of the law?

It was certainly optional with Congress, if they had the power to pass this Act and impose laws to enforce penalties for its violation, to limit the cases where there should be such punishment to wilful and intentional violation of the Act; and it seems impossble that there could be such wilful and intentional violation without a knowledge on the part of

the defendant of the Act itself, such as would be given by referring to the Act in the contract.

Agreeing that undoubtedly all men are presumed to know the law and ignorance is no excuse, yet Congress may enact a different rule and this we submit is what it did by the Act of 1892.

In addition to that, all the facts hereinafter cited as to the emergency clause, and the fact that the work was done in the presence and with the acquiescence of the engineer of the Navy Department who had charge of it, and that such work was not forbidden, and that the Navy Department made no provision against working more than eight hours a day, considering the reasonable necessity for the completion of the pier and that it was all *rush work* and the men only worked nine hours a day. These and the other facts in the case were all matters for the jury to determine whether there had been an intentional violation of the law. But the learned Judge below disregarded it all and charged the jury on this part of the case as follows:

> "I instructed you that it must be shown that the defendant intentionally required or permitted such mechanic to work more than eight hours in any calendar day during the construction of the work and before the finding of the indictment. It has been admitted by the defendant that he knew that DeGaust and Moore were required and permitted to work more than eight hours on June 13th, the calendar day named in the indictment; and I instruct you, gentlemen, that if all the other elements of the offense are present, *that would be an intentional violation of the statute on the defendant's part.* If the defendant intended to permit these men to work over eight hours on the calendar day named, *then he intended to violate the statute,* and there seems to be thus far no question that the elements to which I have referred already are established here."

In this way the court took from the jury the question of intent and himself decided it as a question of law. In so doing, it is submitted, the court plainly disregarded the rule of law. He should have submitted all the facts in the case to the jury and let the jury decide whether Ellis' intent was to violate the law. The jury might have found that Ellis thought, working under the terms of the contract as it was, and under all the circumstances surrounding him, and working with the acquiescence of the navy officer in charge of the work, that it was the kind of work which was not in violation of the law.

In the *United States vs. Quincy,* 6 Peters, 445, a conviction was reversed because of the refusal of the court to submit the question of intent to the jury. It was said:

> "Intention is a question belonging exclusively to the jury to decide. It is the material point on which the legality or criminality of the act must turn."

Lee vs. Lee, 8 Peters, 20, 24:

> "If intention was at all open for inquiry, it is certainly matter for the jury. In the case of the *United States vs. Quincy,* 6 Peters, 466, this Court said that when the intention with which an act is done becomes a subject of inquiry, it belongs exclusively to the jury to decide."

People vs. Black, 125 N. Y., 334, 335:

The Court of Appeals set aside a conviction of a misdemeanor because the lower court had not submitted the question of intent to the jury.

Andrews, J., said:

"However clear the proof may be, or however incontrovertible may seem to the judge to be inference of a criminal intention, the question of intent can never be ruled as a question of law, but must always be submitted to the jury. * * *

"The presumption that a person intends the ordinary consequences of his acts is, as applied to criminal cases, a rule to aid the jury in reaching a conclusion upon a question of fact, and is not a presumption of law."

Extraordinary Emergency,

Webster defines *emergency,*—sudden or unexpected appearance; unforseen occurrence; a sudden occasion.

Extraordinary he defines as—beyond or out of the common order or method; not usual, customary, regular or ordinary.

Emergency has been commented upon in the *People vs. Lee* Wah., 71 California, 80; and *extraordinary,* in *Moses vs. Insurance Company,* 1st Duerr, 170, and The Titania, 19 F. R. 105, and the two words taken together seem to mean a decidedly unforseen contingency. It need not necessarily be sudden, as we commonly understand by an act of God, nor necessarily overwhelming or threatening overwhelming damage.

The practical construction of a statute by the department is entitled to great weight.

See the cases collected, *Lewis & Sutherland on Statutory Construction,* Section 474 (309).

The contract made by the Government with Ellis for the construction of a pier in the navy yard at Boston (so

far as the record shows) does not refer to this Act of 1892, and contains no covenant as to the number of hours any mechanic or employe might work; it provided that the entire work should be concluded within six months; it defined unavoidable delays as follows (p. 6):

> "Unavoidable delays are such as result from causes which are undoubtedly or may reasonably be presumed to be beyond the control of the contractor, such as acts of Providence, unusual storms, fires (not the result of negligence) fortuitous events,, unavoidable accidents etc.; delay caused by acts of the United States will also be regarded as unavoidable delays."

The piling of this pier was to be constructed of sound, straight, long leaf yellow pine, not less than eight inches in diameter at the point and 12 inches in diameter at a point 5 feet from the butt.

The testimony was (p. 13) that there had been delays in obtaining the piles which were not anticipated; Ellis found that he could not obtain the long leaf piles, that nobody would guarantee to furnish them anywhere near a reasonable time. This information was given to the United States as soon as received, and the United States, after waiting awhile, decided in January to allow him to substitute short leaf piles for the long leaf pine piles. Ellis at once made a contract for these, and the party agreed to supply them within sixty days, but he failed to do so, and the piles themselves were not delivered until June, 1906, after repeated efforts by Ellis to hurry them up.

There was also unexpected difficulty in obtaining the white oak piles, and all of this delayed the work, so that on June 13th, Ellis was pushing the work to completion as rapidly as he could, and it was then that the men worked overtime voluntarily so worked (p. 13).

Under the contract, the United States, by its officer in charge, had full control and direction of the work (p. 5),

and Mr. Thompson, the Navy Engineer in charge of the work (p. 7), testified that he did have such charge, and that he knew that men were working on the pier nine hours a day on June 13th (p. 9). He said that the Navy Yard was the home of the North Atlantic Squadron, and that he knew that Ellis was using every effort to complete the pier, including work overtime, and on page 12 he says:

> "I should say that the construction of the pier was reasonably necessary for the safe docking of ships, the safe and economical docking of ships."

Considering the form of the contract and its omission to refer to the Act of 1892,—its omission to restrict the hours of labor,—its time limit,—and the fact of its construction of unavoidable delays,—that the officer of the Navy was himself in charge and control of the work, and that he knew that, there having been unexpected delays in the procuration of the piles for the construction of the piers, Ellis was working overtime to complete the contract, and this without objection by the naval officer himself,—it would be a fair inference that the Navy Department construed this work of Ellis on June 13th as being within a fair definition of the words *extraordinary emergency* in the Act of 1892, even if the construction were not broader, and that is, that the Navy Department did not think work of this character was within the terms of the Act of 1892, but all constituted emergency work.

All these things being true, it is submitted that the learned judge below erred when he charged that, under all the evidence, there was no case of extraordinary emergency present.

APPENDIX.

Act of Aug. 1, 1892, c 352, U. S. Comp. Stat., p. 2521.

CHAP. 352. An act relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia.

Be it Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,

That the service and employment of all laborers and mechanics who are now or may hereafter be employed by the Government of the United States, by the District of Columbia, OR by any contractor or sub-contractor upon any of the public works of the United States or of the said District of Columbia, is hereby limited and restricted to eight hours in any one calendar day, and it shall be unlawful for any officer of the United States Government or of the District of Columbia or any such CONTRACTOR or SUB-CONTRACTOR whose duty it shall be to employ, direct or control the services of such laborers or mechanics to require or permit any such laborer or mechanic to work more than eight hours in any calendar day except in case of extraordinary emergency.

Sec. 2. That any officer or agent of the Government of the United States or of the District of Columbia, or any contractor or sub-contractor whose duty it shall be to employ, direct, or control any laborer or mechanic employed upon any of the public works of the United States or of the District of Columbia who shall intentionally violate any pro-

vision of this act, shall be deemed guilty of a misdemeanor, and for each and every such offense shall upon conviction be punished by a fine not to exceed one thousand dollars or by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court having jurisdiction thereof.

Sec. 3. The provisions of this act shall not be so construed as to in any manner apply to or affect contractors or sub-contractors, or to limit the hours of daily service of laborers or mechanics engaged upon the public works of the United States or of the District of Columbia for which contracts have been entered into prior to the passage of this act.

Approved August 1, 1892.